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No. 62 Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1951

YVETTE J. MADSEN, PETITIONER

v.

NINA KINSELLA, WARDEN, U. S. REFORMATORY FOR WOMEN

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional provisions and statutes involved	2
Statement	5
Argument	12
Conclusion	29

CITATIONS

Cases:

Burke v. *Miltenberger*, 19 Wall. 519	16, 26
Caldwell v. *Parker*, 252 U. S. 376	22
Coleman v. *Tennessee*, 97 U. S. 509	22
Dow v. *Johnson*, 100 U. S. 158	22
The Grapeshot, 9 Wall. 129	16, 26
Handlin v. *Wickliffe*, 12 Wall. 173	17, 26
Leitensdorfer v. *Webb*, 20 How. 176	16
Mechanics' Bank v. *Union Bank*, 22 Wall. 276	17
Neely v. *Henkel*, 180 U. S. 109	17, 18, 28
Ortiz, Ex parte, 100 Fed. 955	17
Pennywit v. *Eaton*, 15 Wall. 380	26
Quirin, Ex parte, 317 U. S. 1	18, 23
Santiago v. *Nogueras*, 214 U. S. 260	17
United States v. *Reiter*, 27 Fed. Cas. No. 16146	17, 26
Yamashita, In re, 327 U. S. 1	14, 18, 24, 27

Constitution, Statutes and Executive Orders:

The Constitution, Art. II, Sec. 2	2, 15
Act of March 3, 1863, c. 75, sec. 30 (12 Stat. 731, 736)	18
Act of October 6, 1949, c. 621 (63 Stat. 709)	28
Articles of War, revised 1874 (R.S. 1342):	
Art. 58	19, 21
Articles of War (amendment of 1916):	
Art. 2	20, 21
Art. 92	21
Art. 93	21
Articles of War, amended by Act of June 4, 1920, c. 227, subch. II, 41 Stat. 787, and the Act of June 24, 1948, c. 625, Title II, (62 Stat. 627):	
Art. 2 (10 U.S.C. 1473)	3, 6, 12
Art. 12 (10 U.S.C., Supp. IV, 1483)	3
Art. 15 (10 U.S.C. 1486)	4, 12, 22
Art. 25 (10 U.S.C. 1496)	24
Art. 38 (10 U.S.C., Supp. IV, 1509)	4, 24, 25
Art. 92 (10 U.S.C., Supp. IV, 1564)	5, 12

Constitution, Statutes and Executive Orders—Continued Page

Articles of War No. 15 reenacted as Art. 21, Uniform Code of Military Justice (50 U.S.C. 581) 22
German Criminal Code, Sec. 211 11
Uniform Code of Military Justice, Art. 21 (50 U.S.C., Supp. IV, 581 22
Executive Order 10062 dated June 6, 1949 8

Miscellaneous:

Allied High Commission Laws:
No. 2 (14 F.R. 7457) 6, 10
No. 13 (15 F.R. 1056) 6, 10

Birkhimer, *Military Government and Martial Law* (3d Ed., 1914) App. I, pp. 581-2 16
Digest of Opinions J.A.G. (1912) p. 1070 24
Fairman, *Some New Problems of the Constitution Following the Flag*, 1 Stanford L.R. 587 27
1 Hackworth, *Digest of International Law* 148 26
Hearings before Subcommittee of H. Com. on Armed Services, 81st Cong., 1st Sess., entitled Uniform Code of Military Justice, pp. 875-7, 975 23
Hearings before Subcommittee of the Sen. Com. on Armed Services, 81st Cong., 1st Sess. entitled Uniform Code of Military Justice, p. 161 23
H. Rep. 491, 81st Cong., 1st Sess., p. 17 23
Manual for Courts-Martial (1949) c. 1, par. 2 ..... 24, 25
Military Government Law No. 2 ..... 6, 7, 10
Military Government Ordinance No. 2 6

Military Government Ordinances effective Aug. 18, 1948, (14 Fed. Reg. 4124-133):
No. 31 ..... 7, 8, 10, 26
No. 32 ..... 7, 26
No. 33 ..... 7, 26

Military Government Proclamation No. 2, Art. III, Sept. 19, 1945 (12 F.R. 6997) 6, 28
1 Records, J.A.G. 468 19
7 Records J.A.G. 440, 486 19
9 Records J.A.G. 236 19
15 Records J.A.G. 373 19
S. Rep. 229, 63rd Cong., 2d sess., p. 53 13
S. Rep. 130, 64th Cong., 1st sess., p. 40 ..... 14, 21, 24
S. Rep. Rep. 486, 81st Cong., 1st sess., p. 13 23
War Dept. Field Manual, FM 27-5 (1943) 24
War Dept. Field Manual, superseded on Oct. 14, 1947 by FM 27-5 (1947) 24
Winthrop, *Military Law and Precedents* (2d Ed., 1896) 16, 17, 18, 19, 20, 24, 26, 28

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OPINIONS BELOW

The opinion of the Court of Appeals (Tr. 209-217[1]) is reported at 188 ~~F. 2d 272~~. The opinion

[1] The record in the Court of Appeals below has been certified to this Court in two parts. The first part contains the proceedings in the District Court for the Southern District of West Virginia (pp. 1-202) and proceedings in the Court of Appeals for the Fourth Circuit (pp. 203-221). The second part contains the printed joint appendix below (pp. 1-114),

of the District Court (R. 78-93) is reported at 93 F. Supp. 319.

JURISDICTION

The judgment of the Court of Appeals was entered April 2, 1951 (Tr. 218). On June 25, 1951, by order of the Chief Justice, the time within which to file the petition for a writ of certiorari was extended to and including July 31, 1951. The petition was filed on July 26, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether courts-martial have exclusive jurisdiction, as against the United States Court of the Allied High Commission, in a case of murder committed by the civilian wife of a United States Air Force officer residing with him in the United States Area of Control in Germany.

2. Whether the tribunal by which petitioner was convicted of murder was a lawfully constituted military tribunal.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Constitution, Art. II, Sec. 2 provides:

> The President shall be Commander in Chief of the Army and Navy of the United States * * *.

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other proceedings in the Court of Appeals (pp. 115-130), and the stipulation with respect to the record in this Court (pp. 131-132).

The designation "Tr." refers to the first part of the record and the designation "R." refers to the printed joint appendix.

The pertinent provisions of the Articles of War, as amended by the Act of June 4, 1920, c. 227 subch. II, 41 Stat. 787, and the Act of June 24, 1948, c. 625, Title II, 62 Stat. 627, provided as follows:

> Art. 2 [10 U.S.C. 1473]. Persons subject to military law.
>
> The following persons are subject to these articles and shall be understood as included in the term "any person subject to military law", or "persons subject to military law", whenever used in these articles: * * *.
>
> * * * * *
>
> (d) All retainers to the camp and all persons accompanying or serving with the Armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the Armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;
>
> * * * * *
>
> Art. 12 [10 U.S.C., Supp. IV, 1483]. General courts martial.
>
> General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these

articles, and any other person who by the law of war is subject to trial by military tribunals * * *.

Art. 15 [10 U.S.C. 1486]. Jurisdiction not exclusive.

The provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.

Art. 38 [10 U.S.C. Supp. IV, 1509]. President may prescribe rules.

The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall, insofar as he shall deem practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: *Provided*, That nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further*, That all rules and regulations made in pursuance of this Article shall be laid before the Congress.

Art. 92 [10 U.S.C. Supp. IV, 1564]. Murder; rape.

Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct; but if found guilty of murder not premeditated, he shall be punished as a court-martial may direct. * * *: *Provided*, That no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

STATEMENT

The petition for a writ of certiorari seeks review of a judgment of the Court of Appeals for the Fourth Circuit (Tr. 218) affirming an order of the District Court for the Southern District of West Virginia (Tr. 196-197) refusing to discharge petitioner in a habeas corpus proceeding. The petition for a writ of habeas corpus (R. 3-8) challenged the jurisdiction of a tribunal, originally known as the "United States Military Government Court for Germany", later known as the "United States Court of the Allied High Commission for Germany", to try and sentence petitioner upon a charge that, on October 20, 1949, in the United States Area of Control in Germany she shot and killed her husband, a Lieutenant serving in the United States Air Force (R. 34, 79).

The proceeding was tried upon the basis of

exhibits and an agreed statement of facts (R. 27-78), which may be summarized as follows:

Petitioner is a citizen of the United States. In or about the month of November 1947, she and her husband entered the American Zone of Occupied Germany (R. 27).[2]

Military government was established in Germany by General Eisenhower in July 1945 (R. 102-103). By Military Government Proclamation No. 2, dated September 19, 1945, "the German law in force at the time of the occupation" was declared "applicable in each area of the United States Zone of Occupation", except as repealed or superseded by the Military Government or other competent authority (R. 103). The composition, jurisdiction, and procedure of the military courts were set forth in Military Government Ordinance No. 2 (R. 100-101). Military courts had jurisdiction "over all persons in the occupied territory except persons other than civilians who are subject to military, naval or air force law * * *." The courts had jurisdiction, *inter alia,* over:

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[2] Petitioner was transported to Germany by the Army and she and her husband were granted billets requisitioned by the Army for military use. She was permitted use of facilities maintained by the Army for its personnel. In general she enjoyed all immunities from German jurisdiction granted persons in the armed forces of the United States (R. 27-28).

It is to be noted that certain immunities from the jurisdiction of German courts were granted to nationals of the United Nations or to "members of the families" of the armed forces by Military Government Law No. 2 and Allied High Commission Laws Nos. 2 and 13 (R. 102, 111-112, 113) without regard to whether such members were or were not persons "accompanying" the armies under AW 2(d).

(i) All offences against the laws and usages of war.

(ii) All offences under any proclamation, law, ordinance, notice or order issued by or under the authority of the Military Government or of the Allied Forces.

(iii) All offences under the laws of the occupied territory or of any part thereof.

Military Government Law No. 2 stated that the courts of Germany were denied jurisdiction over "[c]riminal cases involving * * * a dependent accompanying [any person serving with the Armed Forces of any of the United Nations], or [a]ny national of the United Nations * * *" (R. 102). By Military Government Ordinances Nos. 31, 32, and 33 (14 Fed. Reg. 124-133), effective August 18, 1948, the court system was revised to establish the United States Military Government Courts for Germany upon a district basis with a Court of Appeals for the United States Area of Control (R. 104-105). Jurisdiction as to persons was continued as before, with the additional provision, *inter alia*, "No person subject to military law of the United States shall be brought to trial for any offense except upon authorization of the Commander-in-Chief, European Command" (R. 105-106). On December 11, 1948, by command of General Clay, Commander-in-Chief of the European Command, United States Army, authorization was given "for trial of any dependent of a member of the United States Armed Forces * * *

for any non-military offenses before the appropriate Military Government Court established by Military Government Ordinance No. 31 unless, in a particular case, this headquarters has directed trial by Court Martial" (R. 71).

In April 1949, the Governments of the United States, the United Kingdom, and France agreed to the establishment of a provisional, limited German Federal Republic in their zones and to the establishment of an Allied High Commission composed of one High Commissioner of each of the three occupying powers as the supreme agency to exercise control. This plan became effective September 21, 1949, and the supreme authority in the United States Area of Control became the United States High Commissioner appointed by the President. Offices and officials with new titles were established under the Office of the United States High Commissioner for Germany. However, former military government laws remained in effect unless specifically changed, and the courts established under Military Government Ordinance No. 31 became responsible directly to the United States High Commissioner. Courts of the German Federal Republic, as before, were not allowed jurisdiction over members of families of occupation force personnel.[3]

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[3] Certain details of the above steps taken in 1949 may be set forth as follows:

By Executive Order of the President 10062, dated June 6, 1949, the position of United States High Commissioner was created. The order provided, *inter alia*, that the Commissioner

The foregoing organizational structure was in effect on October 20, 1949, when petitioner was

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should be "the supreme United States authority in Germany," and further provided, *inter alia* (R. 58-59):

"* * * The High Commissioner shall have the authority, under the immediate supervision of the Secretary of State (subject, however, to consultation with and ultimate direction by the President), to exercise all of the governmental functions of the United States in Germany (other than the command of troops) * * *.

"3. With respect to military matters the Commander of the United States Armed Forces in Germany shall continue to receive instructions directly from the Joint Chiefs of Staff. On request of the High Commissioner, such Commander shall take the necessary measures for the maintenance of law and order and such other action as is required to support the policy of the United States in Germany. If major differences arise over policy matters affecting military matters, necessary reports and recommendations shall be referred to the Department of State and to the National Military Establishment for resolution. In the event of an emergency involving the security of the United States forces in Europe, such Commander may take whatever action he considers essential to safeguard the security of his troops.

"4. In the event that the High Commissioner shall assume his duties in accordance with this Executive Order prior to the date that the Military Government of the United States Zone of Germany is terminated, he shall, during such interval, report to the Secretary of Defense through the Secretary of the Army and shall be the United States Military Governor with all powers thereof including those vested in the United States Military Governor under all international agreements."

The Occupation Statute and the Charter of the Allied High Commission for Germany, which became effective September 21, 1949 (R. 52-53, 108-109), provided, *inter alia*, that the German people should enjoy "self-government to the maximum possible degree consistent with [the] occupation," but reserved powers in various fields, including "Protection, prestige, and security of Allied forces, dependents, employees and representatives, their immunities" and "Control * * * over the carrying out of sentences" imposed by "courts or tribunals of the occupying Powers or occupation authorities" and over "amnesty, pardon or release," and reserved general authority to the occupying Powers to "resume, in whole or in part, the exercise of full authority if they consider that to do so is essential to security or to preserve democratic government in

arrested by military police. On October 21, 1949, she was charged with murder under Section 211 of the German Criminal Code before the United

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Germany or in pursuance of the international obligations of their Governments." The Statute also provided that "[l]egislation of the occupation authorities enacted before the effective date of the Basic Law shall remain in force until repealed or amended by the occupation authorities * * *." (R. 109-111.)

Under the Charter of the Allied High Commission "all authority with respect to the control of Germany or over any governmental authority thereof, vested in or exercised by the respective Commanders in Chief of the forces of occupation of the three powers in Germany" would be "transferred to the three High Commissioners respectively to be exercised in accordance with the provisions [of the Charter] and of the Occupation Statute" (R. 41). It was provided that each High Commissioner should be responsible to his Government with respect to his zone for the matters in fields reserved to the occupation authorities, including, *inter alia*, fields mentioned *supra* and "administration of justice in cases falling within the jurisdiction of Allied Courts" (R. 50). On September 21, 1949, by Staff Announcements Nos. 1 and 5, the "Office of the U. S. High Commissioner for Germany" was established, the authority residing in the "U. S. Military Governor" and the "Office of Military Government for Germany (U.S.)" was assumed by the High Commissioner, and it was provided that the courts functioning under Military Government Ordinance No. 31 (see *supra*, p. 7) were to form "an independent judicial unit responsible directly to the United States High Commissioner" (R. 67-69).

In the organization chart forming part of Staff Announcement No. 1, the United States Military Government Courts for Germany appeared under the title "U. S. High Commission Courts," and in Staff Announcement No. 5, the courts were referred to as "The United States Courts for Germany (established as the United States Military Government Courts for Germany pursuant to Military Government Ordinance No. 31)," although the official change of name was not made effective until January 1, 1950 (R. 67-69, 114).

Somewhat similarly to the earlier Military Government Law No. 2 (see *supra*, p. 7), Allied High Commission Law No. 13, effective January 1, 1950 (15 F. R. 1056), in conjunction with Allied High Commission Law No. 2, September 21, 1949 (14 F. R. 7457), prohibited exercise of jurisdiction by German courts over "members of the families" of members of the occupation forces (R. 111-113).

States Military Government Court.[4] A summons containing a copy of the charge and particulars was personally served upon her (R. 28).[5] After a preliminary hearing at which petitioner and her counsel were present, petitioner was held for trial (R. 29). She was brought to trial on February 20, 1950 (R. 30). In accordance with United States Military Government Ordinance No. 31 (R. 105), the court before which petitioner was tried was composed of three United States civilians, two of whom had been appointed as district judges, and one of whom had been appointed as magistrate (R. 30). The court adjudged petitioner guilty as charged and, under the applicable provisions of the German Criminal Code, sentenced petitioner to 15

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[4] Section 211 of the German Criminal Code reads as follows in English translation (R. 29):

Murder—Mord

211. (*As in force prior to 4 September 1941*). Whoever intentionally kills a human being is guilty of murder if the killing was accomplished with premeditation, and shall be punished by death.

211. (*As amended 4 September 1941, RGBI I, 549*). The murderer shall be punished by death.

A murderer is hereby defined as one who kills a human being out of the morbid desire to kill (Mordlust);

For the satisfaction of sexual desire;

For cupidity (Habgier) or any other base motives;

In a treacherous or cruel manner or by means causing common danger, or

In order to make possible or to conceal another offense.

If, in especially exceptional cases, the death penalty is not suitable (angemessen), punishment of confinement for life in a penitentiary shall be imposed.

[5] The agreed statement of facts also recites that a copy of "the charges" was served on petitioner on November 1, 1949 (R. 30). This copy, including notice of "Rights of the Accused" appears at R. 34-36.

years of confinement (R. 30-31). The United States Court of Appeals of the Allied High Commission for Germany affirmed the judgment of the lower court (R. 36-37).[6] After the petitioner was brought back to the United States to serve her sentence, she filed the petition for a writ of habeas corpus involved in this proceeding.

ARGUMENT

1. Petitioner's basic contention is that she was entitled to be tried by court-martial, rather than by any other military tribunal. She argues that she was a person "accompanying" the armies and therefore a "person subject to military law" within the definition of AW 2(d), and that exclusive jurisdiction was conferred upon courts-martial by the provision in AW 92 that a "person subject to military law" committing murder shall be punished "as a court-martial shall direct."

It is the Government's position that petitioner's contention concerning the exclusive jurisdiction of a court-martial is clearly negated by the following specific language of AW 15:

> The provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions,

[6] The higher court, however, changed the part of the judgment committing petitioner to "The Federal Reformatory for Women, Alderson, West Virginia or elsewhere as the Secretary of the Army may direct," so that petitioner was committed to the custody of the Attorney General of the United States or his authorized representative. The above reformatory was then designated as the place of confinement by the Director of the Bureau of Prisons (R. 66).

> provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.

The legislative history shows that this article was inserted for the express purpose of precluding the exact contention which petitioner now makes, i.e., that the inclusion in AW 2, as subject to military law and thus to trial by court-martial, of persons theretofore subject to trial by military commissions confers exclusive jurisdiction on courts-martial.

Speaking in 1912 and 1916 in support of the enactment of AW 15, General Enoch H. Crowder, Judge Advocate General of the Army stated:

> * * * There will be more instances in the future than in the past when the jurisdiction of courts-martial will overlap that of the war courts, and the question would arise whether Congress having vested jurisdiction by statute the common law of war jurisdiction was not ousted. I wish to make it perfectly plain by the new article that in such cases the jurisdiction of the war court is concurrent. [S. Rep. 229, 63d Cong., 2d sess., p. 53.]
>
> * * * * *
>
> Article 15 is new. We have included in article 2 as subject to military law a number of persons who are also subject to trial by mili-

tary commission. A military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law. As long as the articles embraced them in the designation "persons subject to military law," and provided that they might be tried by court-martial, I was afraid that, having made a special provision for their trial by court-martial, it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article was introduced: [quoting AW 15] [S. Rep. 130, 64th Cong., 1st sess., p. 40.]

This Court has summarized the objective of AW 15, as follows (*In re Yamashita*, 327 U.S. 1, 19):

> * * * Since Article 2, in its 1916 form, includes some persons who, by the law of war, were, prior to 1916, triable by military commission, it was feared by the proponents of the 1916 legislation that in the absence of a saving provision, the authority given by Articles 12, 13 and 14 to try such persons before courts-martial might be construed to deprive the non-statutory military commission of a portion of what was considered to be its traditional jurisdiction. To avoid this, and to preserve that jurisdiction intact, Article 15 was added to the Articles. * * *

Clearly, therefore, the fact that petitioner may be a person subject to military law under Article 2 does not preclude her trial by military commission. The only question is whether she is a person who

would have been subject to trial by military commission when Article 15 was enacted.

The various military tribunals other than courts-martial have been a recognized element of military law since the beginning of United States history. Under the common law of war and the constitutional powers of the President as Commander-in-Chief (Const. Art. II, Sec. 2), the military authorities have had both the right and the duty to preserve order and to protect life and property within the area of their activities, including, of course, the lives and property of the military forces. Military tribunals other than courts-martial have historically constituted the means of discharging a large portion of this duty, notably in the case of offenses that were not of a routine military nature and in the case of offenders who were not in the military service.

During the Mexican War, General Scott, in an order of February 19, 1847, provided that various offenses, including murder, committed "by any inhabitant of Mexico, sojourner or traveller therein" or "*by any individual of the* [*United States*] *forces, retainer or* follower of the same" (emphasis supplied) upon another inhabitant, sojourner, or traveler, or upon "any other individual of the same forces," retainer or follower of the same, should be brought to trial before "military commissions." The basis was stated to be the "unwritten code all armies in hostile countries are forced to adopt," referring to the army's "own safety" as well as to

protection of inhabitants against injuries, on the part of the army, "contrary to the laws of war." Birkhimer, *Military Government and Martial Law* (3d Ed., 1914) App. I, pp. 581-582; Winthrop, *Military Law and Precedents* (2d Ed., 1896), pp. 1297-1299. At the same time, General Kearney, upon the conquest of New Mexico, established circuit courts and an appellate court. The jurisdiction of the circuit courts was declared to embrace all criminal cases not otherwise provided for by law and all civil cases not cognizable before the prefects and alcades. The court system, tested in a civil case, was declared valid by this Court and held to be revoked only by direct legislation of Congress or of the Territorial Government. *Leitensdorfer* v. *Webb,* 20 How. 176, 178.

In the Civil War, military commissions were convened as early as 1861 and were extensively employed and recognized throughout that war and the periods of military occupation thereafter. Winthrop, *op. cit.* 1299. A Provisional Court for Louisiana was established by Executive Order of President Lincoln on October 20, 1862, with a civilian judge and with jurisdiction of both civil and criminal causes. Its civil jurisdiction was sustained by this Court in *The Grapeshot,* 9 Wall. 129, 132-133, and sustained for a period beyond the cessation of hostilities in *Burke* v. *Miltenberger,* 19 Wall. 519, 524-525. Its criminal jurisdiction in a murder case was specifically considered and upheld by the Provisional Judge in an extensive,

carefully reasoned opinion, *United States* v. *Reiter*, 27 Fed. Cas. No. 16146 (Prov. Ct. La.). The appointment of a civilian judge by a civilian acting as military governor was treated as valid by this Court in *Handlin* v. *Wickliffe*, 12 Wall. 173, 174-175. The Provost Court of New Orleans, established by the department army commander on May 2, 1862, was held to be validly constituted in *Mechanics' Bank* v. *Union Bank*, 22 Wall. 276, 296.

The various Mexican and civil war military tribunals tried over 2,000 cases including over 100 women. Murder and other civil crimes were tried, and camp-followers and other civilians accompanying or serving with the armies were frequently brought before the commissions. Winthrop *op. cit.* 1252-1253, 1299, 1302, 1308, 1309-1310.

Further precedents are to be found in the military tribunals employed in Cuba and Puerto Rico during and after the Spanish war. Their validity was clearly sustained by this Court. *Neely* v. *Henkel*, 180 U.S. 109, 121, 123; *Santiago* v. *Nogueras*, 214 U.S. 260, 266. And see *Ex parte Ortiz*, 100 Fed. 955, 963 (C.C. D. Minn.). Jurisdiction of military tribunals was upheld as to the crime of embezzlement on the part of an American citizen in *Neely*, and with respect to murder of an Army private by a native Puerto Rican in *Ortiz*.[7]

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[7] Petitioner's contention (Pet. 51) that no question of the legality of military courts was raised in *Neely* is based upon a misapprehension of a statement of this Court (p. 122). This Court stated that it was unnecessary to consider at length the Congressional power to enact an extradition statute

It is thus evident that military commissions were used, not only to try offenses against the *laws* of war,[8] but to punish civilian crimes where the "law of war" made it necessary for such punishment to be handled by military authority. As a matter of fact, ordinary "civilian" crimes such as murder, even when committed by soldiers and officers, were not made punishable by court-martial until 1863. Hence, where such a crime was not committed in the jurisdiction of a civilian court, the offense had to be punishable by some other military tribunal. In 1847, during the Mexican war period, a United States Army captain who was alleged to have murdered another was charged before a military commission. Winthrop, *op. cit.* 1298.

The Act of March 3, 1863, c. 75, sec. 30, 12 Stat.

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with respect to Cuban offenses, because the enactment was clearly supported by a treaty. But the legality of the enactments of the military government was clearly in issue (see pp. 122-123), as was also the validity of the military government's grant of jurisdiction to the former "ordinary courts of criminal jurisdiction" (p. 118), since extradition was available only with respect to violations of "criminal laws in force" in Cuba (p. 111). This Court, also, was confronted with the contention that Cuba had attained such sovereignty that the military government was no longer valid. The contention was rejected (pp. 123-125). Lastly, petitioner contends that the American citizen in Neely "had no connection, directly or indirectly, with our armed forces" (Pet. 51). On the contrary, Neely was Finance Agent of the Department of Posts in Havana. He was an employe of the military government (see 180 U.S. at 118-119, and United States brief, O.T. 1900, No. 387, p. 6) and his offense was not only an offense under the former Spanish law but also under the Postal Code promulgated by direction of the Military Governor (180 U.S. at 118-119).

[8] Thus, military commissions have historically been used to try spies and offenders against the laws of war. *Ex parte Quirin*, 317 U.S. 1; *In re Yamashita*, 327 U.S. 1, 19.

731, 736, did however provide that, in time of war or rebellion, murder, manslaughter, robbery, larceny, and certain other specified crimes, "when committed by persons who are in the military service" should be "punishable by the sentence of a general court-martial or military commission."[9] When this provision first appeared as an Article of War (AW 58) in the revision of 1874 (R. S. Sec. 1342), the words "or military commission" were omitted.[10]

The only possible foundation for petitioner's position would be the argument that, by omitting in 1874 the provision for trial by military commission of persons "in the military service," Congress intended to invest courts-martial with exclusive jurisdiction as against military commissions to try persons "in the military service" for the crimes of murder, larceny, etc. in time of war. Petitioner must then argue that she is a person "in the military service." We submit that petitioner clearly was not "in the military service."[11] Mani-

[9] The opinions in 1 Records, J.A.G. 468, 7 Records, J.A.G. 440, 486, 9 Records, J.A.G. 236, and 15 Records, J.A.G. 373 cited by petitioner from the Civil War years (Pet. 38-39, fn. 26) merely hold that even under the statute, purely military offenses by persons *in* the military service were to be tried by court-martial.

[10] Winthrop at one point (*op. cit.* 1032, fn. 4) speaks of the omission as "proper" because such a commission "is not the appropriate tribunal for the trial of *military* persons." At a later point, Winthrop characterizes the omission as "apparently inadvertent" (*op. cit.* 1300, fn. 4).

[11] The question of whether in 1874 court-martial jurisdiction was made exclusive, as against military commissions, for persons "in the military service", is thus not involved in this case.

festly, the broadened definition in 1916 of persons subject to military law under Article 2 did not place all such persons "in the military service." At the very most, petitioner would have the status of a retainer to the camp[12] and not that of a person "in the military service." Furthermore, as the District Court below pointed out (R. 91-92):

> No case has been brought to my attention involving the trial of a soldier's wife by a military commission; but no difference is perceived between her status prior to the 1916 amendment and that of any other civilian who might be accompanying the army although not connected with it in any of its activities; and since military tribunals undoubtedly had jurisdiction to try such other persons for violations of local criminal laws, this jurisdiction would necessarily extend to the wives of soldiers. It is true that some support may be found in Winthrop's treatise for the theory that wives who accompanied their soldier husbands were to be regarded as "retainers to the camp" (see Winthrop, [*op. cit.*, 133, fn. 7]); but this conception of a wife's function, which may have been tenable in more primi-

[12] The authorities relied upon by petitioner (Pet. 19) to the effect that a wife could be tried by court-martial tend merely to show that a wife commorant with the army was regarded as a camp follower. The only case cited in which such a wife was tried by a British court-martial was an instance in India in 1825 when the status of a wife was very different from her position in 1916. In any event, the fact that a wife may have been so regarded manifestly does not establish that she could not be tried by military commission since, as pointed out above, even soldiers could be tried by military commission for civilian crimes.

> tive times, had certainly lost its force long prior to the year 1916. No one, being realistic, could say that at that time a wife who accompanied her husband on a tour of duty in the army was a "retainer to the camp."

It is true that the amendments of 1916 not only broadened the designation of "persons subject to military law" in AW 2, but also, by AW 92 and 93, made punishable by court-martial an extensive group of crimes, including murder, which had previously, under AW 58, been punishable by court-martial only when committed by persons "in the military service." Thus, after 1916 a person accompanying the armed forces could in time of war or outside the geographical limits of the United States be tried by a court-martial for murder, while before 1916 he could not have been so tried. It was precisely because of that situation, to which General Crowder adverted in his statement (see, *supra,* pp. 13-14), that it was necessary to enact Article 15 preserving concurrent jurisdiction in military commissions. In addition to the statements quoted above, General Crowder said (S. Rep. No. 130, 64th Cong., 1st sess., p. 40):

> It just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient. * * *

Under petitioner's contention (Pet. 37-38), that only offenders or offenses not covered by the Articles of War are now to be dealt with by military tribunals other than courts martial, there would be no "concurrent" jurisdiction, but rather an exclusive jurisdiction of courts-martial for all cases punishable under the Articles of War, and a separate jurisdiction of military tribunals for cases not punishable under the Articles. This latter jurisdiction would not require such an enactment as AW 15, for such jurisdiction would exist by necessity and the law of war to deal with cases outside the jurisdiction of courts-martial. In any event, petitioner's argument, which would make surplusage of the language of AW 15 preserving "concurrent jurisdiction,"[13] falls before the express language of the statute and the very full explanation of its purpose by General Crowder (*supra*, pp. 13-14, 21).

Significantly, when Congress, in 1950, reenacted Article 15 without change as Article 21 of the Uniform Code of Military Justice (50 U.S.C.,

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[13] The mere existence of court-martial jurisdiction is, of course, not intrinsically exclusive of other jurisdiction, *e.g.*, the jurisdiction of District Courts in the United States. *Caldwell* v. *Parker*, 252 U.S. 376, 387-388. Nor do the authorities cited by petitioner support her contention that court-martial jurisdiction is exclusive even where such a mandate as AW 15 is not present. Thus, the decisions in *Coleman* v. *Tennessee*, 97 U.S. 509, and *Dow* v. *Johnson*, 100 U.S. 158, 165, held only that the soldiers and officers of a conquering force were not subject to trial by the enemy; they did not involve trial, as here, by the offenders' own military government.

Supp. IV, 581) it did so with full knowledge that Article 15 had been applied in occupied territory as permitting the trial of American civilians before military government courts such as the court by which petitioner was tried. Both the Senate and House Committees on Armed Services were advised of the creation and operation in occupied territory of military government courts (provost courts in Japan) exercising criminal jurisdiction over American civilians. *Hearings before Subcommittee of the Senate Committee on Armed Services, 81st Cong., 1st Sess. entitled Uniform Code of Military Justice,* p. 161; *Hearings before Subcommittee of House Committee on Armed Services, 81st Cong., 1st Sess., entitled Uniform Code of Military Justice,* pp. 875-877, 975. Thereafter, both committees reported that "This article preserves existing Army and Air Force law which gives concurrent jurisdiction to military tribunals other than courts martial. The language of AW 15 has been preserved because it has been construed by the Supreme Court (*Ex Parte Quirin,* 317 U.S. 1 (1942))." S. Rep. 486, 81st Cong., 1st Sess., p. 13; H. Rep. 491, 81st Cong., 1st Sess., p. 17.

2. Petitioner contends that the tribunal before which she was convicted was not a duly constituted military tribunal. She argues (Pet. 52-56; also 39, 41-42) that the tribunal must be created by the same commanders as are empowered to appoint general courts-martial, that it must be composed

of officers of the Army, and that it must follow the practice and procedure of a court-martial, citing Winthrop, *op cit.* 835; the 1943 War Department Field Manual, FM 27-5;[14] the 1949 Manual for Courts-Martial, Chap. 1, par. 2; Dig. Op. Judge Adv. Gen. 1912, p. 1070, and various decisions and articles in periodicals. The cited authorities do not support petitioner's contentions but constitute at most suggestions and recommendations for practice with respect to military tribunals.[15]

Petitioner also relies heavily upon this Court's suggestion in *In re Yamashita*, 327 U.S. 1, 20, that the Articles of War govern the trial before military commissions of "persons subject to military law as enumerated in AW 2" (Pet. 52). In that case, the Court held that AW 25 and AW 38 did not preclude the use of depositions and hearsay evidence in the trial before a military commission of a person other than those enumerated in AW 2. Assuming that such of the Articles of War as AW 25, which specifically refer to military tribunals generally, apply to the trial by any military tribunal of persons enumerated in Article 2, it

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[14] This Manual has been superseded by the 1947 Manual FM 27-5, October 14, 1947, which no longer contains even the language which petitioner urges as supporting her contentions.

[15] For example, it is true, as contended by petitioner (Pet. 41), that General Crowder, in 1916, referred at one point to courts-martial and other military tribunals as having "the same procedure" but the remark was clarified in the same discussion by his quotation from Winthrop describing the procedure as only an "analogy of courts-martial" (S. Rep. No. 130, 64th Cong., 1st sess., p. 40).

by no means follows that the composition and procedure of military tribunals other than courts martial must be governed in all other respects by the Articles of War. Clearly, such a result is not required by AW 38 which merely *authorized* the President to prescribe the procedure of "courts-martial, courts of inquiry, military commissions, and other military tribunals"—authority which he has never exercised except with respect to courts martial. Since the Manual for Courts-Martial (1949) is expressly limited to the proceedings of courts martial, it is evident that the President has not exercised his authority to prescribe uniform rules for other military tribunals, but, through his military and occupation commanders, has adopted procedures suitable for particular situations. Moreover, such a complete assimilation of all types of military tribunals to courts martial would render meaningless the choice of tribunals which AW 15 sought to preserve in those cases which prior to 1916 were not triable by courts martial.

Petitioner does not allege violation of AW 25 or of any other specific command of the Articles of War applicable to all military tribunals. Instead she contends that she was entitled to be tried by a court composed of Army officers appointed by a military commander empowered to appoint general courts martial, and in accordance with the procedures specified in the Articles of War. The consequences of this contention, if sustained, would be startling. There have resided in the United

States Zone of Occupied Germany thousands of civilian employees of the United States and their dependents, together with the civilian dependents of members of the occupying armed forces, plus a number of American citizens visiting or staying in Germany for their own purposes. As a substitute for the withdrawn jurisdiction of German criminal courts, a large number of these persons could have been subjected to the criminal jurisdiction of army court martials. Instead, the American occupation authorities instituted a system of courts exercising civil and criminal jurisdiction, staffed with civilian judges experienced in American civilian law, and employing procedures embodying every basic procedural right of American civilian law except trial by jury. An appeals court of civilian judges was also established.[16] We submit that this system for administering justice among the many American civilians in occupied Germany is more consistent with our fundamental political ideals than would be the relegation of this function to purely military courts.[17] We believe that only the clearest of

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[16] The composition and procedure of these courts are prescribed in Military Government Ordinances 31, 32 and 33. 14 Fed. Reg. 124-133.

[17] There was clear precedent for appointment of a civilian as military governor or as judge of a military tribunal. (See *The Grapeshot*, 9 Wall. 129; *Handlin* v. *Wickliffe*, 12 Wall. 173; *Pennywit* v. *Eaton*, 15 Wall. 380; *Burke* v. *Miltenberger*, 19 Wall. 519; *United States* v. *Reiter*, 27 Fed. Cas. No. 16146; *Winthrop, op. cit.* 1250-1251, noting the appointment of civilians as military governors in three states in 1862 and in seven states in 1865; 1 Hackworth *Digest of International Law*, 148-149, noting the appointment of a civilian as military governor of Cuba in 1906).

commands in the Articles of War could preclude the President and his military commanders from taking such enlightened action. We have pointed out that nothing in AW 38 compels such a result. Also, we urge that nothing in General Crowder's testimony on the 1916 revision of the Articles of War, cited in the Court's opinions in *In re Yamashita, supra,* need be construed as evidencing a purpose to assimilate all types of military tribunals to courts martial in those cases which prior to 1916 could not be tried by courts martial at all, but only by common law military tribunals. Most important of all, Congress, with at least general knowledge as to the system of military government courts established in Germany, reenacted Article 15 in 1950 without indicating any disapproval of this use of "concurrent jurisdiction".[18]

Petitioner contends that the military tribunal here in question was functioning in an area where military law had ceased to exist (Pet. 3-4, 21, fn. 13, pp. 56-59). The contention is urged principally upon the basis of the new titles given to the military government and courts in 1949 and upon the basis of lay language from public announcements concerning the resumption of a limited degree of self-government by the Germans. It is, however, a misapprehension even of language, to say nothing of actualities (see pp. 8-10, *supra*), to claim that military occupation of Germany had been termi-

[18] See, particularly, Fairman, *Some New Problems of the Constitution Following the Flag,* 1 Stanford L. R. 587, 626-630.

nated in 1949. The test of the nature of both the government and its tribunals is to be found in the ultimate basis of authority. In Germany that basis has been clearly military conquest and continued military occupation.[19] When a similar contention was made in *Neely* v. *Henkel, supra,* this Court replied that it was "the function of the political branch of the Government to determine when such occupation and control shall cease." 180 U.S. at p. 124.[20]

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[19] Grants of limited, provisional power to the Germans were not made for the first time in 1949; such grants were made at the outset of military government. See Proclamation No. 2, Art. III, September 19, 1945 (12 F. R. 6997).

[20] Congress has expressly recognized that the President may carry out the government of occupied territories through other departments than the Department of Defense without thereby changing the fundamentally military basis of the occupation. In appropriating funds to the Department of the Army (Act of October 6, 1949, c. 621, 63 Stat. 709, 712), Congress specifically provided that "the President may transfer to any other department or agency any function or functions provided for under this appropriation." And see Winthrop, *op. cit.* 1246, 1249-1250.

CONCLUSION

The decision below is correct and no conflict of decisions is presented. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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